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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GENTRY E. McKINNEY,

PETITIONER,

-VS-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether 31 U.S.C. §§5322, 5324 of the Bank Secrecy Act requires the court to instruct the jury that the Petitioner knew that "structuring " currency deposits was unlawful?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GENTRY E. McKINNEY,

PETITIONER,

-VS-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Gentry E. McKinney, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit entered on November 26, 1990.

OPINION BELOW

On November 26, 1990 the Court of Appeals entered it Memorandum Opinion affirming Petitioner's conviction on one count of conspiracy to obstruct the IRS in the collection of currency transaction data and to structure transactions to evade the reporting requirements of 31 U.S.C. §5313(a) and sixty one counts of structuring in violation of 31 U.S.C. §§5322 and 5324(3). The court also vacated Petitioner's sentence and remanded for re-sentencing. The Memorandum Opinion of the Court of Appeals was found inappropriate for publication and is attached as Appendix "A".[1]

JURISDICTION

On November 26, 1990, the Court of Appeals entered its Memorandum Decision affirming Petitioner's convictions and vacating his sentence. (App. "A") Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

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[1]No other petitioner is involved in this petition.

STATUTORY PROVISIONS INVOLVED

Title 31 United States Code, §5313(a)

Section 5313. Reports on domestic coins and currency transactions. (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency *** in an amount , denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent of bailee of the person and identify the person for whom the transaction is being made.

* * *

Title 31, United States Code, §5324

Section 5324. Structuring transaction to evade reporting requirements prohibited.
No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction --

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause of attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission of misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

* * *

Title 31, United States Code, §5322

Section 5322. Criminal Penalties.
(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except Section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $250,000, or imprisonment not more than five years, or both.
(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except Section 5315 of this title or a regulation prescribed under section 5315) while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12 month period, shall be fined not more than $500,000 or imprisoned for not more than 10 years, or both.

* * *

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On March 8, 1989, a sixty-six (66) count indictment was filed in the United States District Court for the District of Oregon

charging petitioner and Samuel Waller with the following crimes:

Count 1: Conspiracy to defraud the United States in violation of 18 U.S.C. §371 by combining with others to knowingly and willfully, for the purpose of evading the reporting requirements of 31 U.S.C. §5313(a), structuring currency transactions in violation of 31 U.S.C. §5322 and §5324(3).

Counts 2-66: Knowingly and willfully, for the purpose of evading the reporting requirements of 31 U.S.C. §5313(a), structuring currency transactions in violation of 31 U.S.C. §5322 and §5324(3). (CR 1.)[2]

On August 2, 1989, a superseding indictment was filed reducing the substantive counts to 62 counts. (CR 43; ECR 1-96.)[3]

On September 12, 1989, both the government (CR 54.) and the petitioner (CR 55.) filed their trial memoranda.

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[2]CR refers to Clerks's Record

[3]ECR refers to Excerpts of the Clerk's Record

On September 18, 1989, the petitioner filed his proposed jury instructions. (CR 59.)

On September 18, 1989, the government filed its proposed jury instructions. (CR 64.)

On September 14, 1989, a telephonic hearing was held with regard to issues raised by the parties' trial memoranda (RT VI[4], pp. 2-21) and the court made a tentative ruling with regard to certain jury instructions. (RT VI p.14.)

On September 18, 1989, arguments were held concerning instructions, admissible evidence, and the scope of questioning raised by issues contained in the parties' trial memoranda. (RT II pp. 10-30; ECR 207-228.)

Co-defendant Waller's case was severed from petitioner's case prior to jury trial.

The petitioner was tried before the Honorable James A. Redden and a jury commencing on September 19, 1989., (CR 67.)

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[4] RT VI refers to Reporter's Transcript, Volume VI.

On September 21, 1989, the court denied petitioner's renewal of his pre-trial motions and his motion for acquittal pursuant to Rule 29. (CR 69; RT IV, pp.156; 198-201; ECR 230-238.)

On September 22, 1989, the petitioner was convicted on all 62 counts of the superseding indictment. (CR 70-72; RT V, 103-105.)

On December 18, 1989, the petitioner was sentenced to 60 months in prison concurrent to each other and count 1. He was also ordered to serve a 2-year term of supervised release and to pay a total fine of $2,600,000.00. (CR 85; RT VII, pp.27-28.)

On December 26, 1989, the court filed its 1) Judgment and Commitment Order (CR 86; ECR 184-188.); 2) Fact Finding Order (CR 87; ECR 199-201.); and 3) Opinion Re: Assessment of Fine. (CR 88; ECR 189-198.)

FACTS

Much of the evidence introduced at the trial herein was not disputed. Between January 12, 1988 and April 25, 1988 petitioner made currency deposits or purchased cashier's checks amounting to 1.6 million dollars. These transactions occurred at five local banks in the Grants Pass area of Oregon where the petitioner resided. During the same period petitioner and his co-defendant engaged in other transactions involving cash such as payment of property taxes, purchases of real and personal property and goods and services in an amount of approximately $700,000. The currency deposits and purchases of cashier's checks were generally in amounts of less than $10,000.00.

At the time of the above-stated events, petitioner was a well-known businessman in the Grants Pass area who either owned outright or had a significant partnership interest in large amounts of real estate (both developed and undeveloped), mobile home parks, and motels.

There were a number of significant stipulations entered into by the parties:

1. A detailed stipulation was read to the jury which outlined for each deposit made by petitioner, the date, the bank, the type of transaction and the amount of the transaction. (Govt.'s Ex. 96-2; RT II, pp. 144-186.)

2. The parties also stipulated to the foundation and authenticity of voluminous documentary evidence offered by the government concerning petitioner's past financial affairs. (RT II 144.)

3. Other stipulations concerned facts which tended to negate petitioner's explanations of the source of the funds, i.e. American Security Council not source of funds (RT III 239-241.); Pennzoil Corp. not source of funds (RT II 50-52.); previous partnerships with Fama, Palma, et al, not source of funds (RT III 237-238.).

The government offered a number of witnesses who had worked at the Riverside Inn, which was a large motel in Grants Pass largely owned and managed by petitioner. These witnesses were generally familiar with the bookkeeping and banking procedures used at the motel. They testified that during the

period in question petitioner regularly added cash to the daily bank deposits so as to bring the cash deposits up to a little less than $10,000.000. (RT III - D. Bobinski at 9-50; C. Beaudro at 52-56; C. Madeiros at 127-139; M. Schofield at 139-171.)

R. Surroz was the accountant for the Riverside Inn who also prepared some of petitioner's individual tax returns, various partnership returns, and various mobile home returns which were offered into evidence. (RT III 57-67.) He was also questioned about possible sources of petitioner's income, petitioner's post-search warrant explanations of the source of the 1988 currency deposits, and the fact that the had been paid for some of his services in cash. (RT III 67-80.)

A number of bank employees testified that petitioner personally made numerous deposits of less than $10,000; that he often brought in a large bag of cash containing more than $10,000.00 when he made these deposits; that he often discussed and was aware of the bank's duty to file a CTR on deposits of more than $10,000.00; that his deposits were mainly in stacks of 20's and sometimes 100's; that he made no attempts to hide the

fact that he was intending to deposit less than $10,000 so a CTR would not be filed; and that he often voluntarily stated the source of the funds deposited. (RT III, D. Norquist at 108-124; D. Wendle at 172-206; A. Hatchman at 207-213; M. Peil at 214-230; D. Corliss at 231; and RT IV, C. Brewington at 10-39; G. Hamilton at 40-50.)

Rod Hageman, an IRS agent, testified as to various records and currency seized from the petitioner's home during the execution of search warrants on April 26, 1988. (RT IV 114-126.)

Gary Brown, in IRS auditor, testified as an expert witness. He reviewed all of the voluminous financial records in evidence including 30 years of petitioner's tax returns (with the exception of 1963-1967); records of real estate transactions; the records of petitioner's divorce proceedings in 1979-1983; title company records, and financial statements of the petitioner or his partnerships for the period 1984-1987. The records he reviewed basically covered a lengthy period of time up to the end of the 1987 tax year. He then gave his expert opinion that the records

he reviewed did not reveal a sufficient source to account for the 1.9 million dollars deposited in January through April of 1988 or the $700,000 in cash spent on property and services during the same period. (RT IV 131-154.)

The petitioner did not testify. However through cross-examination of prosecution witnesses; through defense witnesses, and through financial records offered by the government, it was shown that the petitioner, who was 67 years old, had been a wealthy man for many years; had worked for companies involved in national security and defense matters; had been involved in many real estate investments and limited partnerships over the years; and was used to dealing in large amounts of cash. Furthermore, he was totally open and made no attempt to hide the fact that he was depositing large sums of cash. He was well-known at each bank and made no secret about the fact that he didn't want the IRS to be aware of his cash deposits. And finally no one at any of the banks, or his own attorney, ever advised him that what he was doing was illegal.

L. Schulz was petitioner's business lawyer in Grants Pass and his firm had worked on a number of petitioner's real estate transactions. In January of 1988 petitioner told Schulz that he made deposits in local banks and had been told by the banks that as long as these deposits were for less than $10,000.00 the bank was under no legal obligation to report them. Schulz told petitioner that although he had not read the particular statute involved "that is my understanding of the law". (RT IV 169.) At the time that Schulz made this statement to petitioner he was chairman of the board of directors of the Family Bank of Commerce and although aware of the bank's reporting requirements was not aware of the fact that the statute had been recently changed to make structuring illegal. (RT IV 170-171.)

D. Moore worked for the Family Bank of Commerce during January 1988. She testified that petitioner came into the bank on about 20 occasions between January and April and that on many of those occasions he handed the teller a bundles of cash containing $10,000.00 and indicated that he only wished to deposit $9,500.00 or $9,900.00. The teller would remove the

excess cash and hand it back to him.(RT IV 185-186) At no time did the witness advise petitioner that this activity was illegal. (RT IV 189.)

B. Silver also worked for the same bank during January 1988 as a vault teller. She described the same type of activity as Moore, including the fact that no one at the bank ever advised petitioner that his conduct was unlawful. (RT IV 191-195.)

JURY INSTRUCTIONS

The district court refused petitioner's request that the jury be instructed that petitioner's knowledge of his duty not to structure was an essential element of the crime. Instead, over objection (RT V 83-87; ECR 245-249), the court advised the jury that:

> 1. The offenses charged in the indictment refer to the conduct intended and designed to evade the reporting requirement (RT V 74; ECR 240).
>
> 2. That the government did not need to prove that the defendant was aware of the existence of the law he is charged with breaking, i.e. 31 U.S.C. 5324(3) (RT V 78; ECR 244)

3. That the government did not need to prove that the defendant actually knew that structuring was illegal. (RT V 78; ECR 244)

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT BELOW THAT THE GOVERNMENT NEED NOT SHOW THAT PETITIONER KNEW THAT STRUCTURING IN VIOLATION OF 31 U.S.C. §§5322, 5324(3) WAS UNLAWFUL IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND AMOUNTS TO A FUNDAMENTAL AND FAR REACHING CHANGE IN THE INTERPRETATION OF FEDERAL CRIMINAL STATUTES.

In holding that the "willful" requirement of 31 U.S.C. 5322 does not require the government to prove that petitioner knew that "structuring" was illegal, the court below departed from a long line of cases decided by this court and various circuit courts which have held that the term "willful" when used in a federal criminal statute generally means an act done with a bad purpose or with an intent to do something the law forbids. Cheek v. United States, No. 89-656 (Decided January 8, 1991); United States v. Pomponio, 429 U.S. 10, 11-12 (1976); United States v.

Bishop, 412 U.S. 346, 360); Screws v. United States, 325 U.S. 91, 102 (1945); Felton v. United States, 96 U.S. 699 (1878)

The most notable line of cases had dealt with "willful" violations of the federal criminal tax statutes:

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carrying out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws. In United States v. Murdock, 290 U.S. 389 (1933), the Court recognized that.
>
> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." Id. at 396.
>
> The Court held that the defendant was entitled to an instruction with respect to whether he acted in good faith based on his actual belief. In Murdock, the Court interpreted the term

"willfully" as used in the criminal tax statutes generally to mean "an act done with a bad purpose," Id., at 394, or with "an evil motive." Id., at 395.

Subsequent decisions have refined this proposition. In United States v. Bishop, 412 U.S. 346 (1973), we described the term "willfully" as connoting "a voluntary, intentional violation of a known legal duty," Id., at 360, and did so with specific reference to the "bad faith or evil intent" language employed in Murdock.

* * *

Willfulness, as construed by our prior decisions in criminal tax cases, requires the government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. (1991 WL 422 (U.S.) at pp. 4-5)

This Court has also applied the same interpretation of "willful" to federal criminal statutes prohibiting "willful" deprivation of constitutional rights under color of law. Thus, in Screws v. United States, supra, it was pointed out that:

We recently pointed out that "willful" is a word "of many meanings, its construction often being influenced by its context." Spies v. United States, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418. At times, as the Court held in United States v. Murdock, 290 U.S. 389, 394, 54 S.Ct.

> 223, 225, 78 L.Ed. 381, the word denotes and act which is intentional rather than accidental. And See United States v. Illinios Cent. R. Co., 303 U.S. 239, 58 S.Ct. 533, 82 L.Ed. 773. But "when used in a criminal statute, it generally means an act done with a bad purpose." United States v. Murdock, 290 U.S. at page 394, 54 S.Ct. at page 225, 78 L.Ed. 381. And see Felton v. United States, 96 U.S. 699, 24 L.Ed. 875; Potter v. United States, 155 U.S. 438, 15 S.Ct. 144, 39 L.Ed. 214; Spurr v. United States, 174 U.S. 728, 19 S.Ct. 812, 43 L.Ed. 1150; Hargrove v. United States, 5 Cir., 67 F. 820, 90 A.L.R. 1276. In that event something more is required than the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 U.S. 250, 42 S.Ct. 301, 66 L.Ed. 604. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra, 174 U.S. at page 734, 19 S.Ct. at page 815, 43 L.Ed. 1150; United States v. Murdock, supra, 290 U.S. at page 395, 54 S.Ct. at page 225, 78 L.Ed. 381. And that issue must be submitted to the jury under appropriate instructions. Id., at 325 U.S. 101 (Emphasis added)

Felton v. United States, 96 U.S. 699 (1878), one of the earliest cases deciding the meaning of "willful" in the context of a federal statutory crime, involved a distiller's failure to provide and maintain certain equipment to prevent the abstraction of spirits during the distillation process. The Court pointed out that:

> "the word 'willfully'," says *Chief Justice Shaw*, "in the ordinary sense in which it is used in statutes, means not merely 'voluntary', but with a bad purpose." Com. v. Kneeland, 20 Pick., 220. "It is frequently understood," says Bishop, "as signifying an evil intent without justifiable excuse." Felton v. United States, 96 U.S. 699 at p. 703.

Relying on the Court's decisions in the above-noted cases, various circuit courts have applied the same interpretation to the terms "willful" in other federal criminal statutes.[5]

Relying on the Court's decisions in the above-noted cases, various circuit courts have applied the same interpretation to the term "willful" in other federal criminal statutes.[6]

Thus in United States v. Garcia, 751 F.2d 1033 (9th Cir. 1985) the court held that the term "willfully" in 18 U.S.C 665(a) meant a "voluntary, intentional violation of a known legal duty in bad faith or with evil purpose." Id. at 1035.

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[5]See infra, for discussion of circuit cases applying the same interpretation to the term "willful" in prosecutions under 31 U.S.C. §§5322, 5313 and 5316.

[6]See infra, for discussion of circuit court cases applying the same interpretation to the term "willful" in prosecutions under 31 U.S.C. 5322, 5313 and 5316.

In United States v. Armstrong, 781 F.2d 700 (9th Cir. 1986) the defendants were charged with criminal contempt for "willfully" refusing to testify before the grand jury in violation of 18 U.S.C. §401(3) and Fed. R. Crim. P. 42(b). The court pointed out that:

> "Willfulness" is defined as a "volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *Baker*, 641 F.2d at 1317; *United States v. Greyhound Corporation*, 508 F.2d 529, 531-32 (7th Cir. 1974). It implies a "deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order." *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 782 (9th cir. 1983). Id. at 706

Finally, in Lizzagora v. Lizzagora, 541 F.2d. 826 (9th Cir. 1976), it was held that the term "willful" as used in 22 U.S.C. §1934 (willful exportation of ammunition) required proof of "a known legal duty not to export such items before predicating criminal liability." Id. at 828.

In reaching its decision, the court below was bound to follow the decision reached by another panel of the Ninth Circuit in United States v. Hoyland, 903 F.2d 1288, amended 914 F.2d

1125 (9th Cir. 1990). The panel in Hoyland, supra, relied, in part, on United States v. Scanio, 900 F.2d 485 (2d Cir. 1990). Hoyland and Scanio are the only cases that have considered the question of the intent element necessary to prove a violation of 31 U.S.C. §§5322, 5324(3).

The conclusion of the Hoyland and Scanio panels that the term "willful" in 31 U.S.C. §5322 as applied to §5324(3) does not require a bad purpose or an intent to violate the law completely ignores the long line of Supreme Court and Circuit court cases discussed above. Instead, they focus and rely on dicta set forth by J. Learned Hand in a civil damages case decided by the Second Circuit in 1925:

> That has never been the law in English-speaking countries. The word "willful", even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law. American Surety Co. v. Sullivan, 7 F.2d 605, 607 (2d Cir. 1925)

A review of American Surety, supra, reveals that the above-quoted language was not necessary to support the decision

and is contrary to previous and subsequent federal cases on the same issue.

Furthermore, both Hoyland and Scanio rely on the statement in Screws v. United States, supra, that the term willful is a "word of many meanings, its construction often being influenced by its context." Id. at p. 101. However, neither panel cites any cases which have held that the use of the term "willful" in a federal criminal statute means something other than the imposition of a specific intent to violate the law, and both panels ignored the statement made in the same paragraph that "when used in a criminal statute, it generally means an act done with a bad purpose." Id. at p. 101 (Emphasis added)

Similarly, the Hoyland panel's reliance on Balint[7], Behrman[8] and Morisette[9] is completely misplaced.

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[7]United States v. Balint, 258 U.S. 258 U.S. 250 (1922)

[8]United States v. Behrman, 258 U.S. 280 (1922)

[9]Morisette v. United States, 342 U.S. 246 (1952)

In Balint and Behrman the Court held when Congress creates a purely statutory non-common law crime and makes no mention of intent, then the Court would not add or infer any criminal intent to the statute.

> If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent. Behrman, 258 U.S. at p. 288 (Emphasis added)

In Morisette, the Court refused to extend the rule of Balint and Behrman to a situation where Congress merely codified a common law crime.

> Congress, therefore omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute. Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law. for whose definition the courts have no guidance except the Act. Because the offenses before this Court in the Balint and Behrman cases

> were of this latter class, we cannot accept them as authority for eliminating intent from the offenses incorporated from the common law. Morisette, 342 U.S. at p.261 - 262

The instant case is distinguishable from Balint, Behrman and Morisette because here we have a non-common law offense where Congress was not silent on the issue of criminal intent. Congress clearly states in 31 U.S.C. §5322 that only "willful" violations of 31 U.S.C. §5324(3) may be punished criminally. And, as set forth in the long line of cases from Felton, supra, to Cheek, supra, when used in a criminal statute "willful" generally means "an act done with a bad purpose" on an "intent to violate the law."

2. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH NUMEROUS CIRCUIT COURT CASES HOLDING THAT BY USING THE TERM "WILLFUL" IN 31 U.S.C. §5322 CONGRESS INTENDED THAT THERE MUST BE PROOF THAT A DEFENDANT INTENDED TO VIOLATE THE LAW

Title 31 U.S.C. Section 5322 imposes criminal penalties upon persons "wilfully violating this subchapter or a regulation

prescribed under this subchapter . . . " Prior to the enactment of section 5324 the only subchapters to which section 5322 applied were 31 U.S.C. section 5313[10] and 5316[11]. Circuit courts that have had occasion to examine the intent required to prove a violation of these sections have unanimously held that, by imposing criminal penalties only for "willful" violations, Congress intended that there must be proof that a defendant was aware of the duty created by the particular subchapter and a specific intention to violate the law. United States v. San Juan, 545 F.2d 314, 318 (2d Cir. 1976) (construing prior versions §§5316 and 5322); accord United States v. Dichne, 612 F.2d 632, 636 (2d Cir. 1979) (same), cert. den., 445 U.S. 928 (1980); United States v. Granda, 565 F.2d 922, 925-926 (5th Cir. 1978) (same); United States v. $359,000 in United States Currency, 828

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[10]Section 5313 authorizes the Secretary of the Treasury to promulgate regulations requiring that financial institutions report currency transaction involving specified amounts or circumstances, i.e., over $10,000.00.

[11]Section 5316 requires individuals to file a report if they are transporting more than $10,000.00 in currency in or out of the country.

F.2d 930, 933 (2d Cir. 1987); United States v. $122,43.00 in United States Currency, 792 F.2d 1470, 1474 (9th Cir. 1986) (same); United States v. Bank of New England, 821 F.2d 844, 854 cert. den. 484 U.S. 943 (1987) (construing section 5313(a)); United States v. Nersessian, 824 F.2d 1294 (2d Cir 1987) (same).

The rational of the above-cited cases was that by imposing criminal penalties on "willful" violations alone Congress intended to take sections 5313 and 5316 out of the ranks of "strict liability" type crimes.

Thus, in United States v. Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980) in Canadian Currency, 804 F.2d 1085 (9th Cir. 1986) the court pointed out that:

> By imposing criminal penalties on "willful" violations alone, Congress's choice of words suggests that it recognized violations of section 1101[12] may be either willful or nonwillful -- that is, with or without knowledge that the failure to report is illegal. The requirement of willfulness for a criminal violation thus "took this regulatory statute out of the ranks of strict liability type crimes". U.S. v. Granda, 565 F.2d 922, 926 (5th Cir. 1978); see U.S. v.

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[12]Recodified as 31 U.S.C. 5322 (1982).

Chen, 605 F.2d 433, 434 (9th Cir. 1979) Id. at 1090 (emphasis added).

And in United States v. Eisenstein, 731 F.2d 1540 (1984) it was held that:

> Only willful failure to file CTRs are subject to criminal penalties under the Act. See 31 U.S.C. §1058 (1976) (revised version at 31 U.S.C. §5322 (1982)). The law of this circuit is well established that, as it is used in the currency reporting statute, the term "**willful**" require[s] proof of the defendant's knowledge of the reporting requirement and his specific intent to commit the crime. U.S. v. Granda, 565 F.2d 922, 926 (5th Cir. 1978). Congress no doubt made the failure to file CTRs a specific intent crime because, without knowledge of the reporting requirement, a would-be violator cannot be expected to recognize the illegality of this otherwise innocent act. Id. at p. 1543

Based on the foregoing, it is only logical to assume that when Congress considered imposing criminal sanctions for "structuring" in violation of 31 U.S.C. 5324 it recognized that such violations could either be "willful" or "non-wilful" - that is, with or without the knowledge that "structuring" is unlawful. By imposing criminal sanctions through the application of 31 U.S.C. 5322 Congress obviously chose to punish only "willful"

violations. In treating section 5324 violations in the same manner as section 5313 and 5316 violations, Congress clearly intended to take "structuring" out of the ranks of "strict liability crimes". In such circumstances, the jury must be instructed that the government must prove that a defendant was aware that structuring was unlawful and specifically intended to violate the law.

3. THE DECISION OF THE COURT BELOW MISCONSTRUES THE REACH OF SECTION 5324 AND VIOLATES BASIC RULES OF STATUTORY CONSTRUCTION

The conclusion of the panels in Scanio, supra, and Hoyland, supra, that the term "willful" as used in section 5322 requires proof of criminal intent when applied to sections 5313 and 5316, but does not require such proof when applied to section 5324, is in direct conflict with well settled rules of statutory construction.

In the instant case, the plain language of sections 5322 and 5324; the legislative history of section 5324; the prior judicial

construction of section 5322, 5213, 5316, and the rule of lenity in criminal cases all mitigate in favor of a finding that "willful" violations of section 5324 require proof that the defendant was aware that structuring was unlawful and specifically intended to violate the law.

In interpreting the meaning of a particular statute, the "starting point must be the plain language of the statute." Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985) Thus in United States v. Varbel, 780 F.2d 758 (9th Cir. 1986) it was pointed out that:

> We begin our interpretation by reading the statutes and regulation for their plain meaning. The plain meaning rule has its origin in United States v. Missouri Pac. R.R., 278 U.S. 269, 49 S.Ct. 133, 73 L.Ed.322 (1929). There the Supreme Court stated that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." Id. at 278, 49 S.Ct. at 136. The principle was more recently affirmed in Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), reh'g denied, 461 U.S. 911, 103 S.Ct. 1887, 76 L.Ed.2d 815 (1983), where the Court stated, "[I]n determining the scope of a

> statute, one is to look first at its language. If the language is unambiguous, ... it is to be regarded as conclusive unless there is a clearly expressed legislative intent to the contrary. Id. at 110, 103 S.Ct. at 990 (citations and interior quotation marks omitted). In federal courts, the most common effect of the rule has been to preclude resort to legislative history, such as reports, hearings, and debates. A. Murphy, Old Maxims Never Die: The "Plain Meaning Rule and Statutory Interpretation in the 'Modern' Federal Court," 75 Colum.L.Rev 1299, 1299-1300 (1975) Id. at 761.

The plain language of section 5322 indicates that only "willful" violations of section 5324 are punishable criminally. Therefore, in the absence of a clearly expressed legislative intent to the contrary, the statutory language is to be regarded as conclusive.

There is nothing in the legislative history of section 5324 which indicates that Congress intended that the term "willful" as applied to section 5324 means something different than the term "willful" as applied to sections 5313 and 5316.

It must be presumed that Congress acts with deliberation as opposed to inadvertence when it drafts a statute. United States v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985) Furthermore,

it is a settled principle of statutory construction that "[W]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place." United States v. Nunez, 573 F.2d 769, 771 (2nd Cir. 1978); Also see Doctor's Hospital, Inc. of Plantation v. Bowen, 811 F.2d 1448 (11th Cir. 1987); Fortin v. Marshall, 608 F.2d 525 (1st Cir. 1979).

Obviously, the same principles apply when the same word in one section is statutorily directed to be applied to a number of other sections in the same chapter, as is the case herein.

Furthermore, Scanio and Hoyland place great emphasis on the legislative history and policy pronouncements which accompanied the passage of section 5324. However, both cases fail to distinguish between Congress' admittedly clear intent to outlaw structuring an Congress' complete inattention to the mens rea complications engendered by the passage of 5324. In this regard, both cases attempt to expand the reach of, and supersede,

the plain language of section 5322 and 5324 in violation of the rule of lenity.

In a recent case this Court has held that general pronouncements of the purpose of legislation cannot be used to weaken the rule of lenity which generally applies in the interpretation of federal criminal statutes:

> In any event, we need not resolve the policy question surrounding VWPA'a offense-of-conviction limitation on restitution orders. Even where the statutory language regarding the scope of a court's authority to order restitution ambiguous. long standing principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, Simpson v. United States, 435 U.S. 6, 14-15 (1978) (applying rule of lenity to federal statute that would enhance penalty), preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history. See Crandon v. United States, 494 U.S. _____, _____ (1990) ("Because construction of criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text"). Hughey v. U.S., _____ U.S. _____ filed May 21, 1990.

The most that can be said about legislative history cited by Scanio, and relied upon by Hoyland, is that Congress clearly intended to close the so-called structuring loophole created by Ninth Circuit cases such as U.S. v. Varbel, F.2d 758 (9th Cir. 1986). Congress did this, not by imposing a reporting duty on the customer, as suggested by Varbel, but instead by imposing a duty on the customer not to structure transactions by making deposits in amounts of less than $10,000.00. Congress also clearly said that only "willful" violations of this duty are criminal. Thus Congress impose the same intent requirement for violations of section 5324 as it previously had for violations of section 5313 and 5316, i.e. "wilful" conduct.

There is absolutely no language in the legislative history of section 5324 which indicates that Congress intended to change the meaning of the term "willfully" as previously interpreted by the courts in construing 5313[13] and 5316[14]. The excerpts of the

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[13]See U.S. v. Nersessian, 8245 F.2d 1294 (2nd Cir. 1987); U.S. v. Sans,731 F.2d 1521 (2nd Cir. 1984)

legislative history cited in Scanio (900 F.2d 485 at 490) only refer to the intent necessary to a violation of section 5324, i.e. intent to evade the banks reporting requirement under 5313. There is nothing in this legislative history which even remotely indicates that Congress intended to eliminate the additional intent requirement imposed by section 5322, i.e. knowledge of the specific duty imposed by the law and intent to violate that duty, which in the case of 5324, is the duty not to structure. Congress simply did not address this issue when enacting section 5324.

The court in Scanio admits that it holding "seems inconsistent with our interpretation of the same provision in the context . . ." of a prosecution under 5316." *Id.* at 490. The court attempts to gloss over this obvious inconsistency by concluding that the duties imposed by 5313 and 5316 are "obscure" reporting requirements whereas the duty imposed by 5324 is not obscure or directed to less innocent transactions. This is a distinction without a difference. The duty to report certain

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[14]See U.S. v. Granda, 565 F.2d 922 (5th Cir. 1978); U.S. v. Chen, 605 F.2d 533 (9th cir. 1979).

transactions is no less obscure than the duty not to engage in those transactions. Deposits over $10,000.00 are no more "innocent" or "guilty" than deposits under $10,000.00. An individual citizen is no more likely to be aware of the $10,000.00 reporting requirement of 5313 and 5316 than he is to be aware of 5324's requirement to not make deposits in less than $10,000.00 increments. All three sections are directed at otherwise innocent activity which the average citizen is unlikely to know to be the subject of civil regulation or criminal liability. Thus, in the instant case, the petitioner's lawyer, who at the time in question was a member of the board of directors of one of the local banks, was not aware that it was unlawful to "structure" transactions so as to avoid the bank's reporting requirements.

Furthermore, in United States v. Eisenstein, supra, it was held that Congress intended that the government must even prove that a "financial institution" was aware of the reporting requirement of section 5313 before criminal penalties could be imposed.

Thus Scanio and Hoyland basically hold that private individuals who deposit currency at financial institutions such as banks are to be held to a higher standard of knowledge of the Bank Secrecy Act and treasury regulations promulgated thereunder than the financial institutions themselves. It is extremely doubtful that Congress intended this result, especially since it is common knowledge that financial institutions are much more likely to be aware of federal regulations in this area.

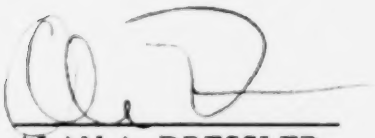
The interpretation of the term "willful" in Hoyland and Scanio renders the term meaningless and eliminates the requirement of willfulness which Congress clearly intended for violations of section 5324. In this sense Hoyland and Scanio have judicially repealed section 5322 as it applies to section 5324.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE G. WALKER
Attorney for Petitioner



ALAN A. DRESSLER
Attorney for Petitioner

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

GENTRY E. McKINNEY,

Defendant-Appellant.

NO. 90-33066

DC NO. CR-89-60021-RE

MEMORANDUM[1]

Appeal from the United States District Court

for the District of Oregon

James A. Redden, District Judge, Presiding

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3

Argued and Submitted October 2, 1990

Seattle, Washington

Before: KOZINSKI, O'SCANNLAIN, and FERNANDEZ, Circuit Court Judges.

Defendant, Gentry E. Mckinney, challenges his conviction for structuring transactions to evade the currency reporting requirement of 31 U.S.C. §5313, in violation of 31 U.S.C. §§5322 and 5324(3), and conspiracy to commit those offenses. He also challenges the computation of his offense level under the Sentencing Guidelines ("Guidelines") and the constitutionality of his sentence under the Guidelines. We affirm the conviction, but vacate the sentence and remand for resentencing.

BACKGROUND

From January 12 to April 25, 1988, McKinney deposited $1,524,384.44 to fourteen accounts at five banks. His codefendant and son-in-law, Samuel Waller, deposited $448,816.97. McKinney engaged in transactions on seventy-three of the seventy-five banking days in that period. All

of the transactions were structured so that the financial institution did not have to file the currency transaction report ("CTR") form for the transactions over $10,000. McKinney indicated on numerous occasions that he did not want the CTR form to be filed. In addition, he paid property taxes totalling $99,620.89 to Josephine County and purchased real estate, property, and services totalling $520,690.08.

On April 24, 1988, Roger Wirth, Special Agent for the Internal Revenue Service ("IRS"), submitted a lengthy affidavit which summarized the transactions described above. Wirth sought and obtained ten warrants to search McKinney and Waller, various properties, and motor vehicles. In addition, Wirth sought and obtained six warrants for funds in various accounts. The warrants were served on April 26, 1988.

During the transactions, McKinney told his employees and the bankers a number of stories about the source of the funds. After the searches, McKinney sent a letter to the IRS.

The letter, dated May 11, 1988, explained that his income was from California holdings, which were sold or exchanged.

McKinney and Waller were indicted on March 8, 1989. A superseding indictment charged McKinney with one count of conspiracy to obstruct the IRS in the collection of currency transaction data and to structure transactions to evade the reporting requirements of 31 U.S.C. §5313(a). In addition, he was charged with sixty-one counts of structuring in violation of 31 U.S.C. §§5322 and 5324(3).

McKinney filed a motion to quash five of the warrants for overbreadth, which the court denied. He also filed a motion in limine to preclude, among other things, evidence concerning his explanations for the sources of the deposits. That motion was denied. He then filed a second motion in limine to preclude evidence of payments to entities that were not financial institutions required to file CTRs. That motion, too, was denied.

McKinney submitted a jury instruction which stated that the government had to prove that he purposefully intended to violate the law. The court rejected that instruction. As to Counts 2 through 62, the court instructed the jury that the government must prove that the defendant acted willfully. In addition, the court instructed:

> The Government need not prove that the defendant, Gentry E. McKinney, was specifically aware of the existence of the law he is charged with breaking in this case, 31 U.S.C. Section 5324(3).
>
> Nor must the Government prove that the defendant Gentry E. McKinney, actually knew that structuring as I have defined it for you was itself unlawful. If you find that structuring occurred, and was knowingly and willfully engaged in by the defendant for the specific purpose of evading a reporting requirement that was known by the defendant to exist, that is sufficient.

He was convicted on all counts.

McKinney was subject to sentencing under the Sentencing Guidelines. The Pre-Sentence Report ("PSR") referred to an attached memorandum from IRS Special Agent Wirth. That

memorandum detailed McKinney's personal and financial involvement with known drug traffickers. The PSR concluded those persons were closely associated with McKinney and Waller. In addition, the PSR concluded that McKinney "controlled and directed" Waller.

The PSR assigned McKinney a base offense level of thirteen, because he "structured transactions to evade reporting requirements." U.S.S.G. §2S1.3(a)(1)(A). The offense level was adjusted upwards five levels because McKinney "knew or believed that the funds were criminally derived property." U.S.S.G. §2S1.3(b)(1). The offense level was then adjusted upwards six points because the "value of the funds managed by Mr. McKinney totalled $2,593,782." Finally, the offense level was adjusted upwards two levels because McKinney was al leader in criminal activity. U.S.S.G. §3B1.1(c). The total offense level was 26.

McKinney objected to fixing the base offense level at thirteen, instead of five,

pursuant to U.S.S.G. §2S1.3(a)(2), as well as to all of the upward adjustments. The court rejected these contentions, and sentenced him to sixty months imprisonment, two years supervised release, and a fine of $2,600,000. McKinney filed a timely notice of appeal. The district court had jurisdiction under 18 U.S.C. §3231. We have jurisdiction under 28 U.S.C., §1291 and 18 U.S.C. §3742.

DISCUSSION

A. Jury Instruction.

We review de novo whether jury instructions properly state the elements of an offense. United States v. Spillone, 879 F.2d 514, 525 (9th Cir. 1989), cert. denied, 59 U.S.L.W. 3248, 3250 (U.S. Oct. 1, 1990) (Nos. 89-1924, 90-5149). McKinney contends that to prove a violation of 31 U.S.C. §§5322 and 5324(3), the government must show that the defendant wa (1) aware of his duty not to structure and (2) knowingly and intentionally violated his duty. We rejected that argument in U.S. v. Hoyland,

903 F.2d 1288, 1291-92 (9th Cir. 1990), amended, No. 89-50253, slip op. 11271 (Sept. 14, 1990). The district court's jury instructions properly stated the elements of the offenses charged.

B. Search Warrants.

We review de novo the issue whether search warrants lack particularity. U.S. v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986). Whether warrants are sufficiently precise depends upon (1) whether probable cause exists to seize all items of a particular type described in the warrants, (2) whether the warrants set objective standards to differentiate between items to be seized and those that may not be seized, and (3) whether the items to be seized could be described with greater particularity at the time the warrants were issued. Id.

First, there was probable cause to search for all of the items described in the warrant. The affidavit of Special Agent Wirth describes a lengthy series of transactions which would justify the belief that numerous documents

existed to support the transactions. Second, the items were all related to the offenses of structuring or laundering funds, and a reference to structuring or money laundering limited the warrants. See U.S. v. Fannin, 817 F.2d 1379, 1383 (9th Cir. 1987). Third, the items could not have been described with greater particularity. There was probable cause to believe that McKinney was involved in a large scale money laundering operation. Moreover, it appeared that he had mixed the tainted cash into his various business and other transactions. Thus, a wide-ranging search was supported by probable cause. See U.S. v. Offices Known as 50 State Distrib. Co., 708 F.2d 1371, 1374, (9th Cir. 1983), cert. denied, 465 U.S. 1021, 104 S. Ct. 1272, 79 L. Ed. 2d. 677 (1984). Under all of these circumstances, the warrants were sufficiently particular.

C. Motions in Limine.

McKinney first claims that the district court erred when it allowed the prosecution to

introduce evidence of his explanations for the source of the currency. The government claims that the explanations were evidence of the crime charged and, even if the explanations were evidence of "other crimes," the evidence was admissible under Fed. R. Evid. 404(b). We review de novo the determination that the acts at issue were "other crimes" and review for abuse of discretion the decision to admit evidence. U.S. v. Mundi, 892 F.2d 817, 820 (9th Cir 1989).

One of the overt acts of the conspiracy alleged was that McKinney had stated that the funds were rental payments from the tenants of his mobile home parks. Thus, this evidence was direct evidence of one of the crimes charged.

The remaining explanations were admissible under Fed. R. Evid. 404(b). The false explanations tended to show McKinney's mental state. That is, McKinney intended to cause the financial institutions to fail to report his transactions. His statements helped to carry

out that design by misleading the financial institutions into believing that there was nothing irregular about the transactions.

Second, McKinney challenges the admission of his transactions with non-financial entities in the payment of property taxes and the purchase of property. Again, these acts were alleged in the indictment as overt acts. Those overt acts were related to the overall scheme to conceal transactions form the government. see U.S. v. Soliman, 813 F.2d 277, 279 (9th Cir. 1987). It was not an abuse of discretion to admit those acts into evidence.

D. Sentencing.

The court reviews the district court's interpretation of the Guidelines de novo. U.S. v. Howard, 894 F.2d 1085, 1087 (9th Cir. 1990). First, McKinney contends that the district court incorrectly imposed the burden of proof upon him to prove his entitlement to a base offense level lower than the one sought by the government.

This court has stated that "the government

should bear the burden of proof for any fact that the sentencing court would find necessary to determine the base offense level. Since the government is initially invoking the court's power to incarcerate a person, it should bear the burden of proving the facts necessary to establish the base offense level." Howard, 894 F.2d at 1090. That burden is by a preponderance of the evidence. Id.

The district court's analysis was consistent with this analytical framework. The court first stated that the conduct described in U.S.S.G. §2S1.3(a)(1)(A) had been proven at trial. If the government proved that conduct beyond a reasonable doubt, then it must have proven that conduct by a preponderance of the evidence. It was only after holding that the conduct had been proven at trial that the district court held that McKinney had the burden to establish the lower offense level under U.S.S.G. §2S1.3(a)(2). That is, once the government had proven facts to support a

particular offense level, McKinney at least had the burden of coming forward with evidence to show that a lower offense level applied to his situation. Id. He did not do so.

Second, McKinney challenges the five-level adjustment under U.S.S.G. §2S1.3(b)(1). The court found that McKinney knew or believed that the funds were criminally derived property. It cited that amount and method of packaging of the currency, McKinney's false explanations of the source, the failure to document income in 1988, and the cash investments from and associations with persons allegedly involved in drug activities. Given the factual support in Worth's memorandum of October 24,1989, the government sustained it burden of showing that the adjustment was warranted.

Third, McKinney challenges the upward adjustment by six levels pursuant to U.S.s.G. §2S1.3(b)(2). That provision states that, "If the base offense level is from [U.S.S.G. §2S1.3(a)(1)] and the value of the funds

exceeded $100,000, increase the offense level as specified in §2S1.1(b)(2)." The court interpreted "the funds" to mean all funds involved, whether or not the transaction involved a financial institution required to file CTRs. That is, the entire $2,593,782 figure was used, rather than the $1,524,384.44 involved in the bank transactions. We agree that the district court erred in this respect.

There is no reason to believe that U.S.S.G. §2S1.3(b)(2) does anything more than incorporate the schedule set forth in U.S.S.G. §2S1.1(b)(2) into the structuring Guideline itself. Therefore, for purposes of U.S.S.G §2S1.3(b)(2), the word "funds" retains the definition in that Guideline, that is, funds involved in structuring transactions. The fact that the schedule itself is found in a Guideline dealing with laundering in general does not mean that the scope of the word "funds" should be expanded to all laundering activities when one incorporates the schedule into the structuring

Guideline. That incorporation should be seen as no more than a convenience by which the Sentencing Commission avoided setting forth the schedule itself again and again. It was, therefore, improper to add the money involved in other transactions to the amounts involved in the structuring transactions.

Fourth, McKinney challenges the upward adjustment by two levels for his role in the offense. This court reviews the factual determination underlying that adjustment for clear error. E.g., United States v. Carvajal, 905 F.2d 1292, 1295-96 (9th Cir. 1990). McKinney played a major role in the transactions, while Waller participated on a less frequent basis. More importantly, McKinney compensated Waller for Waller's activities, while there were no payments or credits from Waller to McKinney. Therefore, the adjustment was appropriate. See U.S. v. Sanchez, 908 F.2d 1443, 1447-48 (9th Cir. 1990).

Fifth, McKinney argues that his sentence is

unconstitutional because sentencing facts were adduced in violation of his sixth amendment right to jury trial, fifth amendment due process right to proof of guilt beyond a reasonable doubt, sixth amendment right to cross-examination, and fifth amendment right to indictment by grand jury. None of these arguments has merit. Proof of sentencing facts by a preponderance of the evidence and to a sentencing judge does not violate the fifth amendment nor does it violate the sixth amendment right to jury trial. McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L. Ed. 2d 67 (1986). See Howard, 894 F.2d at 1090. Because McMillan applies, the cross-examination and indictment claims also fail. See also U.S. v. Fernandez-Vidana, 857 F.2d 673, 675 (9th Cir. 1988).

Conclusion

We therefore AFFIRM McKinney's conviction. We VACATE his sentence and REMAND for resentencing.